



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 107 OF 2019

(From Original Conviction and Sentence in Hamisi PMCCRC No. 785 of 2017

(Hon. M Nabibya, SRM) of 20th December 2018)

HUMPHREY LUMASIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein has proffered this appeal challenging his conviction and sentence in Hamisi SRMCCRC No. 785 of 2017, of the offense of robbery with violence, contrary to section 295, as read with section 296(2) of the Penal Code, Cap 63, Laws of Kenya, and of gang rape, contrary to section 10 of the Sexual Offences Act, No. 3 of 2016, with an alternative charge of committing an indecent act with an adult, contrary to section 11(a) of the Sexual Offences Act. He was convicted of robbery with violence and gang rape, and was sentenced to serve twenty years' imprisonment, based on the *Francis Karioko Muruatetu & another vs. republic (2017) eKLR (Maraga CJ & P, Mwilu DCJ & VP, Ojwang, Wanjala, Njoki & Lenaola SCJJ)*, and for the gang rape another twenty years, with both the sentences running concurrently.

2. The duty of a first appellate court was stated by the Court of Appeal, in *Gabriel Kamau Njoroge vs. Republic (1987) eKLR (Platt, Apaloo JJA and Masime Ag JA)*, in the following words:

“ ... it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect.”

3. The facts of the case, as presented in the trial court, are that on at 1.30 AM on 14th May 2017 PW1, the complainant, PW2, woke up to find two hooded men inside her house, armed with torches, a long metal rod and a *panga* or cutlass They put her on the floor and raped her in turns. They ransacked the house, then they left. PW2 went out to call Alex, a neighbour, who in turn called another neighbour, Johnstone, who then called the police. She was taken to hospital, and reported the incident at Mudete Police Station. She stated that they stole her two phones, a kilo of sugar, bar soap, money, and other items. One of the phones was tracked, and recovered, but nothing else was recovered. She said that she was not able to identify any of the persons arrested and presented in court. PW3, was one of the neighbours who was woken up after the incident, and who escorted PW2 to hospital and to the police station. PW4 was the person found with the stolen phone. He said it was given to him by the appellant, as security for some maize that he had given to him. PW5 was the police officer to whom the first report was made. PW6 was a phone repairer to whom PW4 had given the phone for repair. PW7 was an officer from Safaricom, he produced call data records from the recovered phone, which showed that it was initially used by a line registered to PW2, then by another belonging to Daniel Nyapola and finally to PW4. PW8 investigated the matter, while PW1 was the clinical officer who attended to PW2 after the incident.

4. The appellant was put on his defence. He gave a sworn statement, and denied the charges. He said that no phone was recovered from him, but that he knew PW4. He started that on 14th May 2017, he was working at a school, and slept at home during that night.

5. At the end of the trial, the trial court evaluated the evidence, and was satisfied that the offence of robbery with violence had been proved to the required standard, convicted the appellant accordingly, and sentenced him as indicated in paragraph 1 here above.

6. The appellant was aggrieved by the conviction and sentence, and proffered the instant appeal, raising several grounds of appeal. He avers that the identification evidence was unsound, the case was poorly investigated, there was no medical evidence to link him to the sexual offence, the prosecution case was full of contradictions, and burden of proof was shifted to him.

7. The appellants put in written submissions in support of their case. The respondent also put in written submissions. I have read the written submissions placed in the record before me, and I have noted the arguments made in all of them. I shall examine each of the grounds raised and argued in turns.

8. The first ground turns on identification. The arrest of the appellant had nothing to do with identification. PW2 did not identify her assailants. She did not give any leads, with respect to identification, that would have led the police to the appellant. The case was, therefore, not founded on identification at all. That would mean it was founded purely on circumstantial evidence. There was completely no evidence at all that placed the appellant at the scene of the crime, either from the victim PW2, or PW3 the only other person who was in the vicinity.

9. The second ground is that the case was poorly investigated. Whether a case is poorly or well investigated is really not here nor there. A trial court does not base its decision on that. It could be that the investigations were poor, but the witnesses may, nevertheless, give credible testimony upon which the court may find basis for a conviction.

10. The third ground is on the gang rape charge. The appellant avers that there was no medical evidence to link him to the offence. Under section 124 of the Evidence Act, Cap 83, Laws of Kenya, the court can convict of sexual offences purely on the basis of the testimony of the victim, so long as the court was satisfied that the victim was telling the truth, and, therefore, the failure to present forensic evidence is not fatal. The courts in *Kassim Ali vs. Republic* [2006] eKLR (Omolo, Bosire 7 Githinji JJA) and *Paul Kibet Rotich vs. Republic* [2011] eKLR (Ouko J), said that commission of a sexual offence could be corroborated by circumstantial evidence, and absence of medical evidence to support the fact of the offence was not decisive, as the fact of the offence could be proved by the oral evidence of the victim or by circumstantial evidence.

11. Of course in the instant case, the victim did not identify her attackers, and, therefore, there is no direct evidence pointing at the appellant. Her oral evidence is, therefore, of little use with respect to the application of section 124 of the Evidence Act. The only basis upon which the charge can stick on him is circumstantial evidence, if it is established that the circumstances of the case link him to the events of that day, even if the victim of the crime did not place him at the scene or implicate him with the act of sexually assaulting her.

12. The fourth ground relates to what the appellant calls contradictions in the evidence. He points at the make of the phone allegedly stolen, was it a Huawei Y520 or Huawei 1520 or Huawei 520. The charge read Huawei Y520, PW2 said she lost a Huawei 1520, while PW4 stated that what was recovered from him and was produced in court was a Huawei 520. Secondly, the IMEI number, the charge sheet indicates 86J280021477370, while what was submitted to Safaricom for analysis was number 865280021477379. This might appear to be a sheer case of numbers, but the point the appellant is making is formidable. The case against him is built purely on the basis of the recovery of the said phone. It is a case of pure circumstantial evidence founded on the matter of that phone. So, the prosecution was bound to present a strong case. These inconsistencies have the potential of weakening its case, for questions would arise as to whether the case that the prosecution set out to prove, as reflected in the charge sheet, was the one they presented in court. The appellant was charged with stealing a Huawei Y520. The evidence presented made no reference to a Huawei Y520, instead the witnesses talked of Huawei 520 and 1520. No effort was made to demonstrate whether there were three different brands, or that the witnesses were merely using the shorter form to identify the same brand of the phone. Secondly, the IMEI number in the charge document on the Huawei Y520 was 86J280021477370, but the IMEI number on the Huawei 520 phone presented in court was 865280021477379. Which was which? Was it safe to convict with all these inconsistencies, and especially in the absence of evidence directly pointing at the appellant's complicity?

13. The final ground is that the burden of proof was shifted to him. In his written submissions, the appellant has not dwelt on this ground. I have looked through the trial record, and I have not come across any material that would suggest that the trial court did shift burden of proof to him.

14. What he has dwelt with at length in his written submissions, is a matter that is not raised in his petition of appeal, but which is really the crux of the matter, the doctrine of recent possession. His conviction was founded on a phone that was recovered in December 2017 from PW4. The theft had happened in May 2017, and, therefore, recovery was happening six or seven months later. The phone was not recovered from the appellant. Indeed, there is nothing concrete that links him to it, except the word of PW4, that he was the one who gave it to him. When the phone call data records were retrieved by PW7, none were traceable to the appellant. None of the lines that used the handset allegedly were traced to him. The evidence of PW4 ought to have been handled with great circumspection in view of this. PW4 was himself a suspect, to the extent that he was found in possession of the handset traceable to the victim of the robbery and rape. I would agree that an effort should have been made to trace the other user of the handset, Daniel Nyapola, given that, other than the word of PW4, there was no other evidence that linked the appellant to the phone. A mobile phone is an item that can change hands very fast. There is no evidence that the appellant ever handled the phone at any point, for the doctrine of recent possession to be used as the basis for his conviction.

15. Overall, I am of the persuasion that the conviction of the appellant was not safe, it was based on the flimsiest of circumstantial evidence. I shall accordingly quash the said conviction, in respect of the two charges, and set aside the sentences imposed. The appellant shall be set free forthwith, unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF DECEMBER, 2021

W MUSYOKA

JUDGE